IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 2ND APRIL 2007 / 12TH CHAITHRA 1929

Crl.Rev.Pet.No. 2842 of 2004()

CRA.141/2001 of ADDL.SESSIONS COURT,-I, MAVELIKKARA
CC.92/2000 of JUDL.MAGISTRATE OF FIRST CLASS, HARIPAD

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REVN. PETITIONER(S): APPELLANT/ACCUSED:

ANIRUDHAN, S/O. KRISHNA PANICKER,
KATTIL MARKET P.O., THAMALLACKAL SOUTH MURI,
KUMARAPURAM VILLAGE.

BY ADV. SRI.G.RAJEEVKUMAR

RESPONDENT(S): RESPONDENTS/COMPLAINANT & STATE:

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1. ASOKA PANICKER, S/O.KRISHNA PANICKER,
KUNNATHUKATTIL, POTHAPALLY VADAKKUM MURI,
KUMARAPURAM VILLAGE.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

ADV. SRI.M.RAMESH CHANDER FOR R1
PUBLIC PROSECUTOR SRI. C.K.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HEMA, J.

Crl.R.P. No. 2842 of 2004

Dated this the 2nd day of April, 2007.

O R D E R

Revision petitioner was convicted and sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.5000/- and in default to undergo simple imprisonment for one month under Section 138 of the Negotiable Instruments Act ('the N.I. Act') by the Judicial Magistrate of First Class. In appeal, the said conviction and sentence were confirmed. Hence, this revision.

2. According to prosecution, the accused borrowed an amount of Rs.3 lakhs from the complainant-respondent on 30.3.1999 for the purpose of his business. He did not repay the amount inspite of repeated demands. Later, he issued a cheque dated 30.11.1999 for Rs. 3 lakhs on an account maintained by him in the bank. The cheque, on presentation, was dishonoured due to insufficiency of fund. A notice was issued demanding payment, but no amount was paid in spite of receipt of notice. No reply was also sent. After complying with the legal requirements, the complainant, therefore, filed the complaint

under Section 138 of the N.I. Act before the Magistrate Court.

3. The complainant examined PWs 1 to 3 and marked Exts.P1 to P8 to prove his case. The accused examined DW1 and DW2 and marked Exts.D1 to D3 on his side. On an analysis of the evidence, the trial court found that the prosecution proved its case and convicted the accused under Section 138 of the N.I. Act. In appeal, learned Sessions Judge also found that the evidence of PWs 1 and 2 and Exts.P1 to P8 established that Ext.P1 cheque was dishonorued on the ground of insufficiency of funds. Since issuance of cheque is proved, presumption under Section 139 was drawn in favour of the complainant. It was held that the defence evidence is not sufficient to disprove the execution of cheque and the presumption under Section 139 of the Act. The conviction and sentence were therefore confirmed.

4. Revision petitioner-accused and his counsel were absent at the time when the case was called. The case is specifically posted for disposal today. Still, there is no representation for petitioner. Respondent' s counsel is present. On going through the records and the judgments of the courts below, I find that clear illegality is committed in this case which deserves interference. Before convicting the accused for an offence under any law, the court has to consider whether the ingredients of the

offence are established by prosecution. The lower appellate court has not considered whether any of the ingredients are proved, in the right perspective.

5. A reading of the judgment shows that the lower appellate court has not considered any of the facts which are in dispute or the rival contentions raised in this case. In paragraph 6 of the judgment, the court below made a reference to the provision in Section 138 of the N.I. Act and stated briefly what are the requirements to be established for an offence under Section 138 of N.I.Act.

6. A reading of Section 138 of the Act shows that it is inevitable for the prosecution to establish that the cheque was drawn by the accused. Without entering a decision that the cheque was drawn by the accused, no accused can be convicted for offence under Section 138 of the Act. The lower appellate court has not adverted to the most important ingredient of the offence and without entering a finding on this issue, the conviction was passed against revision petitioner. The court below has also not considered whether the purpose of drawing of cheque was discharge of a debt or liability.

7.The court has entered a finding that the oral evidence is not sufficient to “disprove” the execution of the cheque and the

presumption under Section 139 of the Act. The accused has a case that no amount was received by him on the date alleged by the prosecution and that he had not issued any cheque for alleged purpose. He has a definite case that he has not received any amount on 30.3.1999 on the date on which the amount was allegedly given The complainant 's case is that on 30.3.1999 the accused borrowed Rs.3 lakhs from him.

8. But, in the evidence, PW2 has not stated that amount was borrowed on 30th March,1999. On the other hand, his case is that amount was borrowed on 30th September, 1999 much after the date on which the amount was allegedly borrowed. This inconsistency has not been explained by the complainant inspite of a pointed question in the cross-examination relating to the date on which the amount was borrowed.

9. If it was only a mistake it could have been clarified, especially since the accused had taken up a contention that no amount was received by him as alleged by the prosecution. He had even examined witnesses to prove that no amount was given on the date on which the amount was allegedly given as per the allegations in the complaint. Though the complainant's case is that the amount was paid on 30.3.1999, he deposed in court that the amount was paid on 30th September, 1999.

10. It is also relevant to note that PW2 gave evidence that he is a tax payer and the amount which is borrowed by the accused was shown in the Income Tax statement. His case is that he had not taken any document from the accused for evidencing payment of a huge amount of Rs. 3 lakhs. In such circumstances, in the light of the challenge, complainant ought to have produced the Income Tax return to substantiate that his case is true. But no steps are taken to prove his case.

11. On the other hand, the court below found fault with the accused for not adducing sufficient evidence to disprove the case of the prosecution. This is against all principles of law. The case of the prosecution is to be established by the prosecution even in cases where the prosecution can take aid of presumption in favour of the prosecution. The court below has also not considered whether complainant is entitled to receive and recover the amount stated in the cheque and whether he is a holder of the cheque. Hence in the absence of proof of these facts, the court below went wrong in drawing a presumption in favour of the complainant in respect of the purpose for which the cheque is received by the complainant.

12. The complainant failed to prove that the cheque was drawn by the accused as alleged. The inconsistency in the

defence will not be sufficient to prove the case of the prosecution. The drawing of the cheqeu has to be independently proved by the prosecution either by direct evidence or by circumstantial evidence. A mere allegation that a cheque is drawn by the accused will not be sufficient to prove drawing of cheque.

13. The respondent's counsel was not able to convince this court that the findings entered against petitioner are sustainable. In the above circumstances, conviction and sentence are unsustainable and those are set aside. The accused is found not guilty of the offence under Section 138 of the Act and he is acquitted of the above offence. He is set at liberty forthwith

The revision petition is allowed.

Sd/-

K. HEMA, JUDGE.

Krs.